



War and International Law: Distinguishing the Military and Humanitarian Professions

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I

War and International Law: Distinguishing Military and Humanitarian Professions

David Kennedy*

Introduction: a Common Profession

I would like to begin by thanking Admiral Shuford, Professor Dennis Mandsager and Professor Charles Garraway, as well as Major Richard Jaques and Commander Dale Stephens, who have given me—and my students—a warm welcome at the Naval War College. I appreciate their generous hospitality and good counsel.

For civilian students and academics like me, who have never served in uniform, the military profession can seem to be a different universe. But how different are we, professionals within and outside the armed services? How different are the professions of war and peace?

When I was a young man, they could not have seemed more different. I registered as a conscientious objector after the Christmas bombings of Hanoi in 1972, and eventually became an international lawyer. I hoped I would find work promoting peace, economic development, humanitarian and progressive values on the global stage. Nothing seemed as different as the humanitarian and military

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Distinguishing Military and Humanitarian Professions

professions—the one made war, the other sought to limit war's incidence and moderate war's violence.

Indeed, the military seemed to me then all that international law was not—violence and aggression in contradiction to our reason and restraint. It was only later that I learned how many international lawyers serve with the military—and how readily humanitarians have rushed to legitimate the use of force.

War and peace. I studied history and political science. War, we learned, “broke out” when “disputes” could not be resolved peacefully, when cosmopolitan reason gave way to nationalist passion, when the normal “balance of power” was upset by abnormal statesmen. These bad guy statesmen pursued outmoded projects of aggrandizement, domination, aggression or imperialism. They were in cahoots with what we called “the military industrial complex”; not knowing we were quoting Eisenhower.

Realpolitik was the disease; the softer wisdom of international law and international relations was the cure. The key to peace was wise statecraft and conflict management. We put our faith in negotiations among the disputing parties—which we hoped to facilitate. We were sure that reasonable aspirations for peaceful change should—and would—be accommodated by wise leaders, for whom we would serve as advisors. Leaders who would act for the common good, in a global humanitarian and cosmopolitan spirit. Leaders like that would address the roots of war in poverty, cultural backwardness, nationalist isolation, or ideological fervor. They would need—and want—help from the institutional machinery of the international community.

More than anything else, management for peace would require procedures—good practices, good offices, a steady and imaginative institutional framework and a cadre of dedicated humanitarian policy experts who could express and implement the world's general interest in peace. The United Nations, the non-governmental organizations (NGOs), and civil society, the peacemakers and peacekeepers, needed to succeed so that the military would never again be needed.

How did we imagine the military? Our knowledge was limited, our imagery vague. All that ceremony and hierarchy, training to kill. They were hot, passionate; we were cooler heads prevailing. We were dry, focused, pragmatic and managerial. I think we imagined war as it is depicted in films of the ancient world. The troops mass at the border, a command is given and everyone rushes forward helter-skelter, applying lethal force as fast and furiously as possible.

But of course it is not like this at all. Scoundrels do rule—often there simply is no wise and benevolent ruler waiting for our advice about the general good.

More importantly, military and civilian professionals, although certainly different, are no longer oil and water. War must also be managed by experts. The more I have

known military officers and military lawyers, the more obvious the parallels between our professions have become. The more I've come to see us all as managers. And the more I've seen that when we differ, it is often the military that are the cooler heads.

Some years ago, before the current war in Iraq, I spent some days on board the *USS Independence* in the Persian Gulf. Nothing was as striking about the military culture I encountered there as its intensely regulated feel. Five thousand sailors, thousands of miles from base, managing complex technologies and weaponry, constant turnover and flux. It was absolutely clear that even if you could afford to buy an aircraft carrier, you couldn't operate it. The carrier, like the military, is a social system, requiring a complex and entrenched culture of standard practices and shared experiences, rules and discipline.

The carrier is also a small town. I remember the eager salesman in a crowded mess hall selling Chevrolets for delivery when the crew next hit shore. I came away completely ready to believe that, at least in principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation, not because the military has gone soft, but because there was simply no other way to make modern warfare work. Warfare has become rule and regulation.

In a way, of course, the routinization of law—humanitarian law—in the military professions is a terrific achievement. Military professionalism affirms civilian control. But more, our military and humanitarian professions have merged, yielding a humanitarian military and a realistic, pragmatic humanitarianism.

But I worry. Was there nothing valuable in the separation of military and humanitarian professions? As our professions merge, what happens to the virtues of standing outside, speaking humanist truth to military power? And what happens to the real political necessity for the military to break some eggs when the going gets tough? What, moreover, happens to the legal "principle of distinction?"—the principle that military and civilian professions must be distinguished.

My project this morning is to retrace the laws about warfare to illuminate, as best I can, the ways in which the military and legal professions have marked and unmarked the boundary between war and peace, and some of the virtues and vices of strengthening and weakening our sense that humanitarian and military professionals march to different drummers.

Looking back, the legal mind has sometimes sharply distinguished war and peace, and sometimes blurred them together. The modern laws of war inherit both traditions—and now offer us a confusing mix of distinctions that can melt into air when we press on them too firmly. A law of firm rules and loose exceptions, of foundational principles—and counter principles. This complex professional language can certainly limit our vision. For the legal professional—whether serving in

Distinguishing Military and Humanitarian Professions

the military or the humanitarian world—the challenge is to engage this slippery body of material strategically as a partner in, rather than a substitute for, political leadership and command responsibility.

The narrative line in this very complex historical story is actually quite simple—the rise and fall of a distinction between war and peace. For the early 19th-century jurist, war and peace were far less distinct than they came to seem in the half century before the First World War. After that war, 20th-century international lawyers sought to bridge the gap that had opened between war and peace, to routinize humanitarianism in the military profession and pragmatism among humanitarians.

Although they were quite successful—our professions have merged—the potential to distinguish has not been eliminated. Instead, the relationship between war and peace has become, for the humanitarian lawyer and military professional, itself something to be managed. We now have the rhetorical and doctrinal tools to make and unmake the distinction between war and peace. And we do so as a tactic in both war and peace. The result is less a difference between the outside of humanitarian virtue and the inside of military violence than a common profession whose practitioners manage the relationship between war and peace within a common language; all the while working in the shadow of a new outside, the world we think of as “politics.”

Historical Backdrop: the Rise of “Modern War”

Our laws of war were forged in the shadow of a new “modern” conception of warfare. In the late 18th and early 19th centuries, what had been an aristocratic endeavor of the old regime became the general project of a nation—an extension of public policy, an act of the whole.

This is the development crystallized by Clausewitz as a continuity between war and peace. We have come to treat his formulation as classic:

We know, certainly, that War is only called forth through the political intercourse of Governments and Nations; but in general it is supposed that such intercourse is broken off by War, and that a totally different state of things ensues, subject to no laws but its own. We maintain, on the contrary, that War is nothing but a continuation of political intercourse, with a mixture of other means.¹

The new attitude Clausewitz proposes had been building for a generation. But the revolutionary break with the *ancien regime*—and the Napoleonic wars that followed—drove it home. The transformation of war from the interpersonal, dynastic and religious struggles of an aristocracy to the public struggles of a nation—a

citizens' army, the *levee en masse*, the army "of the republic"—made war visible as an extension of national policy, as a project of the whole society.

War became continuous with the political intercourse of peacetime as it became the public affair of a nation—an instrument of national policy, an expression of national sovereignty, a sign of national honor. The ancient marks of military distinctiveness, the uniform, the profession, the codes of honor, became synonymous not with aristocratic status, but with public life—and often with submission to civilian leadership.

Latent in the merger of war and public policy lay a distinction between the old war and the new—wars of chivalry, honor and passion, versus wars of reason, calculation and policy.

It took some time for this new vision to take hold. In 1838, a few years after Clausewitz wrote, and long before he would become a wartime president, Abraham Lincoln spoke of the abolitionist cause in these terms: "Passion has helped us, but can do so no more. It will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defense."²

In saying this, Lincoln was understood to set himself against war—the just cause would need the calm determination of cooler peacetime heads. Two and a half decades later, however, Lincoln would be embroiled in a war that would confound this easy opposition of passionate war and reasoned peace.

Our Civil War—birthplace for so much of the law in war—is often remembered as the first "modern" war. In part, this is winner's history—a war of the modern North against the antebellum South, a war of industrial power and the Federal Nation, against the old military order of chivalry and the old sectarianism of region. A culture of commerce defeating a culture of honor, cold Northern reason slowly quenching the hot passions of the South in the name of a National Whole.

But the Civil War's modernity lay not only in the Northern victory. For both sides, this was a war pitting the full economic and spiritual powers of their imagined community against another in a struggle for national identity. Modern war conducted as total war, war of the whole, war for the whole. In this sense, Lincoln's unimpassioned reason would not forestall war; it would become war. But neither would it remain split from passion, as Lincoln's inspired vocabulary of sacrifice, sanctification—"we cannot dedicate, we cannot consecrate, we cannot hallow this ground"³—would attest.

More than anything, the modernity of the Civil War lay in the strange brew of reason and passion through which the struggle was understood by both sides. The Northern cause was also a crusade, the Southern military also a redoubt of professional skill, thought, and art, against an often brutal Northern campaign. The

Distinguishing Military and Humanitarian Professions

rhetorical tools for distinguishing war and peace, new wars and old wars, were there, but they were redirected to define the relations between the warring parties.

This mix of passion, reason and national expression on both sides conjured up a war of singular ferocity. In a sense, the Clausewitzian vision had been realized—war had become continuous, in reason *and* passion, with the great political struggles of the nation.

Legal War: Modern War Encounters Modern Law

On the one hand, 19th-century legal developments contributed to this emerging vision of warfare. The private modes of warfare associated with the old regime, now thought incompatible with a unitary public sovereign monopoly of force, were progressively eliminated. The 1856 Paris Declaration,⁴ for example, eliminated “privateering,” a complex legal institution through which “letters of marque” authorized private vessels to carry out belligerent acts. Henceforth there would be one sovereign, one military.

At the same time, however, late 19th century changes in legal consciousness transformed what it meant for war to be the exclusive act of a public sovereign. Most crucially, by the end of the 19th century, it no longer meant that war was continuous with peace, or a project of the *whole*—more the opposite.

The emergence of a sharp distinction between public and private brought with it the image of a transnational commercial space that should be kept free from contamination by public force. Private armies, mercenaries, privateers; all these were outmoded, not only because they were part of an aristocratic past, but because they did not fit with the new, exclusively *public* nature of sovereign war powers.

The public realm had become one sphere of power among many, marked off from the private realm of the market and the family. Public warfare that had seemed general, continuous with the whole society, now seemed, in legal terms, specific—the project of the *government*, not the society.

Law's Allies: Humanitarians Speaking Virtue to Violence

Humanitarian voices supported the legal separation of war from the domain of peace. Broad pacifist campaigns arose from diverse sources: church leaders, proponents of woman's suffrage, heirs to the abolition movement, as well as political activists of all types—anarchists, socialists, populists, progressives, Catholics.

These diverse voices marked the distinction between war and peace in various ways—as ethics against politics, as faith against the cruel logic of commerce, as calm reason against fanaticism, modern logic against the primitive culture of

honor. In fact, the terms with which they marked the line from peace to war parallel those by which both sides distinguished North and South.

All these voices spoke to war, to the statesmen and military who made war, from outside—in the name of an alternative ethical vision, sometimes national, more often universal. War and peace were separate—Clausewitz was now the problem. We might now say they pled for peace by speaking truth to power. The point was to shrink the domain of war through moral suasion, agitation, shaming, and proselytizing. In their view, blurring war with peace was both dangerous and immoral.

This conviction lent an ethical urgency to the emergence of a sharp legal distinction between war and peace. Each was now a legal status, separated by a declaration. Combatants and noncombatants, neutrals and belligerents have different bundles of legal rights and privileges. The battlefield, the territory of belligerency, was legally demarcated. The legal treatises of the period began to place the law of peace and the law of war in separate volumes. In part, these distinctions aimed to limit the carnage of war by expanding the privileges of civilians and limiting the military privilege to kill.

These distinctions were also part of a broader reorganization of legal thought, sharpening the distinction between the public and the private sphere, hardening private rights and limiting public powers to their respective spheres.

For all, peace and war were to be legally separated, for example, private rights were increasingly thought to be continuous across the boundary. It is here that we began to see the logic of thinking that when the dust settles after a war claiming the lives of millions, destroying empires, and remaking the political and economic landscape of the planet, people might reasonably feel they are still entitled to get their property back.

In short, the late 19th century developed an alliance between two rather different sets of ideas. A moral conviction that the forces of peace stand outside war, demanding that swords be beaten into ploughshares, and a legal project to sharpen the distinction between public powers and private rights.

The result was a legal conception of war as a public project limited to its sphere. The legal distinctiveness of war reinforced the idea that war was itself a discrete and limited phenomenon—over there, the domain of combat. It seemed reasonable to expect that warriors stay over there—and that protected persons, even women soldiers, stay outside the domain of combat.

This alliance of ethics and legal form has continued across the 20th century and is with us still. We see it in the effort to restrain war by emphasizing its moral and legal distinctiveness—by walling it off from peace and shrinking its domain. We see its echo in the many varieties of 20th-century pacifism, in efforts to revive “just war” theory as an exogenous truth that can limit military power, and in the struggle

Distinguishing Military and Humanitarian Professions

to bring the language of human rights to bear on the military, that is, to judge the effects of war by a different and higher ethical standard. But we also see it in efforts to treat combat and “police action” as fundamentally—ethically, legally—different; the one the domain of human rights, the other the proper domain of the law of armed conflict.

I have a great deal of sympathy for this outsider approach. It is where my own professional and ethical journey began; in a moral world for which the Clausewitzian perspective was precisely the problem. To think war and peace continuous was to think the unthinkable. And to embrace a cynical, *realpolitik* point of view which, because it could think war, would also find itself making war, was similarly unthinkable. If you can’t tell the difference between war and peace, how can we even have a conversation about limiting war’s violence? In this view, our only hope is to bring an external reason to bear on the violence of war—and an external ethical passion to the cold calculation that war might sometimes make sense.

The Dark Sides of Outsider Virtue: Limits to the Alliance

Nevertheless, the dark sides of this outsider’s perspective are now familiar. There is, and I will come back to this, the uneasy feeling that war simply is no longer as distinct as all that. Even assuming war might be conducted “over there,” in its own domain, it has always been difficult to keep one’s ethical distance from warfare in modern discussions of international affairs.

There is the nagging problem that force also has humanitarian uses in a wicked world. Moreover, war can strengthen our moral determination. We know that great moral claims often become stronger when men and women kill and die in their name. There is some kind of feedback loop between our ethical convictions and our use of force. Moreover, we know how easily moral clarity calls forth violence and justifies warfare. It is a rare military campaign today that is not launched for some humanitarian purpose.

Looking back, this was a great lesson of the Civil War—both parties experienced their project and excoriated their opponents as both cool reason and hot crusade. Both battled in the name of the National Whole. Everyone was speaking truth to power as they went at one another tooth and nail.

In the years since, we have learned how easily ethical denunciation and outrage—triggering intervention in Kosovo, Afghanistan, even Iraq—can get us into circumstances where we are not able to follow through and cause the making of humanitarian promises which war cannot deliver. The universal claims of human rights can seem to promise the existence of an “international community” which is simply not available to back them up.

Indeed, the discourse of ethical denunciation often has a tip of the iceberg problem. Take Abu Ghraib. Sexually humiliating, even torturing and killing prisoners is probably not, ethically speaking, the worst or most shocking thing our Coalition has done in Iraq. We should worry that our outrage at the photos may also be a way of not thinking about other injuries, deaths and mutilations our government has wrought.

Outrage can distract us from the hard questions. Was the problem in Abu Ghraib a legal violation—or a failure of leadership? Was the failure one of human dignity—or tactics? The whole episode was clearly a military defeat. But we are left with the nagging question. If it could be kept secret, if it could be done pursuant to a warrant, perhaps sexual humiliation can help win the war; might, on balance, reduce the suffering of civilians and combatants alike.

We know, moreover, that following absolute ethical precepts in wartime—as any other time—can become its own idolatry. Is it sensible to clear the cave with a firebomb because pepper spray, lawful when policing, is unlawful in “combat”? Absolute rules lead us to imagine we know what violence is just and what is unjust, always and for everyone. But justice is not like that, it must be imagined, built by people, struggled for, and redefined, in each conflict in new ways. Justice requires leadership—on the battlefield and off.

Of course, for all these difficulties, much can sometimes be achieved by bringing humanitarian reason to bear on cultures of violence and by opposing the cruel calculations of cynical statesmen with ethical commitment.

Still, an external moral discourse may not be able to stay all that external. Often, the trouble begins when it hits the problem of exceptions. What if it were Hitler, what if there were genocide, what if they were raping your mother? What about self-defense? What about deterrence? These classic questions take us straight to the doctrinal world of flexible standards, balancing conflicting considerations, assessing proportionality that is familiar to the professional weighing costs to achieve gains. To figure out when and how much self-defense is “just,” we need technical, professional military expertise.

Some commentators reacted to the 1996 International Court of Justice opinion on the *Legality of the Threat or Use of Nuclear Weapons*⁵—a fabric of legal equivocations—by shaming the Court for speaking with nuance about an apocalypse; for parsing the “slaughter of the innocents” into the awkward categories of Article 38; for worrying more about the validity of norms than the future of humanity.

The horrors of warfare, the dead and mangled bodies, the lives and families ripped apart, the intense anxiety and suffering on and off the battlefield, the pain of a single wounded child crying out, it seems obscene to speak of these things in any language but that of moral clarity, regret and outrage.

Distinguishing Military and Humanitarian Professions

But is there, in fact, an alternative mode of discussion on which to ground this sensibility? Once we set out to speak of nuclear war as “slaughtering the innocents,” we would soon enough need a definition for innocent. We would need to account not merely for the horrors of Hiroshima and Nagasaki, but also for their singularity. How can the dangers of nuclear proliferation, nuclear error, nuclear first use best be prevented? Serious, difficult questions. What about deterrence, does it work? When? And, of course, what about torture? When does it work?

Moreover, presuming we speak about the slaughter of the innocents in order to reduce the likelihood of nuclear war—rather than merely to bear witness, we will need to assess ethical denunciation itself in tactical terms. What are the costs and benefits of denunciation? When should we trim our sails a bit, hold back, even flatter those whose fingers are on the button, in the name of an effective pacifism? Of course, if we hold our rhetorical fire this time people may die. People whose death we might have prevented, in whose torture we acquiesce, whom we sacrifice for the larger ethical objective of a stronger law in war, or a more legitimate International Committee of the Red Cross (ICRC).

Strategy Switching: Humanitarian Pragmatism and Antiformalism

Over the last century, these difficulties and ambiguities have eroded confidence in the outsider strategy; an erosion sped by the fate of the legal consciousness with which this strategy had been allied. The first half of the 20th century saw a widespread loss of faith in the formal distinctions of classical legal thought; in the wisdom, as well as the plausibility, of separating law sharply from politics, or private right sharply from public power.

This loss of faith has had consequences for efforts to limit the violence of warfare through law; both undermining classic distinctions, between belligerent and neutral, for example, and opening new strategies for moving more fluidly between military and humanitarian professional vocabularies.

As a result, the strategy of external denunciation—naming and shaming—has never had the grip in the law of force that it has had, say, in the field of human rights. Indeed, the modern law of force represents a triumph for grasping the nettle of costs and benefits and infiltrating the background decision-making of those whom it would bend to humanitarian ends.

The result was a new, modern law in war. This is the law known to the ICRC and much of the European international law establishment as “humanitarian law,” and to the US military as the “law of armed conflict.” They are speaking about the same thing. I prefer the classic term “laws in war” or *jus in bello*.

As early as the Civil War, the humanitarian project sought less to distinguish war from peace, or just war from unjust war, or good guys from bad guys, than to limit the violence of all sides through an insider strategy of professionalization. It is not surprisingly that Francis Lieber, author of an early code of conduct for battle⁶ had relatives on both sides in our Civil War. The law in war we have inherited eloquently illustrates the strengths and weaknesses of this professionalization strategy.

The “law in war”—associated most prominently with the International Committee of the Red Cross—has always prided itself on its pragmatic relationship with military professionals. It is not unusual to hear military lawyers speak of the ICRC lawyers as their “partners” in codification—and compliance—and vice versa. They attend the same conferences, and speak the same language, even when they differ on this or that detail.

Developing a common insider vocabulary did not mean jettisoning rules; it meant first of all placing the rules on a firmer footing in the militarily plausible. Rules are not external expressions of virtue, but internal expressions of professional discipline.

Already in the 19th century, many humanitarians thought the best way to proceed was to work with the military to codify detailed rules they can respect—no exploding bullets, respect for ambulances and medical personnel, and so forth. To this day, the most significant codifications have indeed been negotiated among diplomatic and military authorities.

In this, the codified 19th-century law in war was something of an exception to the prevailing spirit of classical legal thought—and a precursor for what would follow in the 20th century. Rather than elaborating private rights against public powers, it harnessed the authority of public sovereignty to the articulation of limits; foreshadowing an international legal positivism that would be theorized only in the early decades of the 20th century as a repudiation of 19th-century efforts to ground law outside sovereign consent.

Of course, this reliance on military acquiescence limited what could be achieved—military leaders outlaw weapons which they no longer need, which they feel will be potent tools only for their adversaries, or against which defense would be too expensive or difficult. Narrowly drawn rules permit a great deal—and legitimate what is permitted.

Recognition of these costs is one reason the pragmatism of the law in war has always meant more than positivism; more than deference to sovereign consent; more than legal clarity; more than realism about the power of nation States. Pragmatism has also meant antiformalism—principles and standards replacing rules.

As you all know, since at least 1945, a vocabulary of principles has grown up alongside tough-minded military bargains over weaponry. The detailed rules of

Distinguishing Military and Humanitarian Professions

The Hague or Geneva law have morphed into standards—simple ideas which can be printed on a wallet-sized card and taught easily to soldiers in the field. “The means of war are not unlimited,” “each use of force must be necessary” and “proportional.” These have become ethical baselines for a universal modern civilization.

Humanitarians have sought to turn rules into principles to render the narrow achievements of negotiation in more general terms; transforming narrow treaties into broad custom. Military professionals have done the same for different reasons—to ease training through simplification, to emphasize the importance of judgment by soldiers and commanders operating under the rules, or simply to cover situations not included under the formal rules with a consistent practice. Apparently, for example, a standard Canadian military manual instructs that the “spirit and principles”⁷ of the international law of armed conflict apply to non-international conflicts not covered by the terms of the agreed rules.

It is not just that rules have become principles—we as often find the reverse. Military lawyers turn broad principles and nuanced judgments into simple bright line rules of engagement for soldiers in combat. Humanitarians comb military handbooks and government statements of principle promulgated for all sorts of purposes, to distill “rules” of customary international law. The ICRC’s recent three volume restatement of the customary law of armed conflict is a monumental work of advocacy of just this type.

In the modern law in war, both rules and standards are simultaneously understood in the quite different registers of “validity” and “persuasion.” In the world of validity, the law is the law—you should follow it because it is valid. If your battlefield acts do not fall under a valid prohibition, you remain privileged to kill. Full stop. On the other hand, however, as a tool of persuasion, the law in war overflows these banks. It will be hard to argue—particularly to persistent opposers—that many of the purportedly customary rules in the ICRC restatement are, strictly speaking, “valid.” But there is no gainsaying their likely persuasiveness in many contexts and to many audiences.

We are used to working with the law of armed conflict in the key of validity. We make rules by careful negotiation. We influence customary rules by intentioned and public behavior. We send ships through straits or close to shorelines both to assert and to strengthen rights.

But we will need to become more adept at operations in the law of persuasion. The domain in which the image of a single dead civilian can make a persuasive case for a law of armed conflict violation trumps the most ponderous technical legal defense.

The law in war of persuasion is not only the product of overreaching humanitarian outsiders, of course. The military also interprets, advocates, seeks to persuade. This reinterpretation of rules and principles has brought humanitarian law inside the vocabulary of the military profession and brought complex considerations of strategy to the humanitarian professions. As a framework for debate and judgment, this new law in war embraced the unavoidability of trade-offs, of balancing harms, of accepting costs to achieve benefit—an experience common to both military strategists and humanitarians.

Take civilian casualties. Of course, civilians will be killed in war. Limiting civilian death had become a pragmatic commitment—no unnecessary damage, not one more civilian than necessary. In the vernacular of humanitarian law, this becomes no “superfluous injury” and no “unnecessary suffering.” The range of complex strategic calculations opened up by this idea, for those inside and outside the military, is broad indeed.

We might say that the old distinction between combatants and civilians has been relativized. What, in any event, can it mean for the distinction between military and civilian to have itself become a principle? The “principle of distinction”—there is something oxymoronic here—either it is a distinction, or it is a principle.

Of course, it is but a short step from here to “effects-based targeting,” and the elimination of the doctrinal firewall between civilian and military, belligerent and neutral. But, thinking in humanitarian terms, why shouldn’t military operations be judged by their effects, rather than by their adherence to narrow rules that might well have all manner of perverse and unpredictable outcomes?

I was struck during the NATO bombardment of Belgrade—justified by the international community’s humanitarian objectives in Kosovo—by the public discussions among military strategists and humanitarian international lawyers of the appropriateness of targeting the civilian elites most strongly supporting the Milosevic regime. If bombing the bourgeoisie would have been more effective than a long march inland toward the capital, would it have been proportional, necessary, indeed humanitarian to place the war’s burden on young draftees in the field rather than upon the civilian population who sent them there? Some argued that targeting civilians supporting an outlaw, if democratic, regime would also extend the Nuremberg principle of individual responsibility. Others disagreed, of course. But the terms of their disagreement were provided by shared principles.

The law in war today offers the basis for both external denunciation of military action and internal calculation of its necessity or proportionality. Although they do not lie easily with one another, our thinking fades easily from one to the other. Take the Abu Ghraib photos. The law in war offers us two quite different vocabularies for reacting to the photographs, neither of which is satisfactory. First, moral

Distinguishing Military and Humanitarian Professions

outrage. We have repeatedly heard it said that the administration, like so many others, was “shocked by the photos.” They may have been—but I wonder. If Rumsfeld was indeed shocked, might he not be just a bit too naïve to be entrusted with taking the country to war? He was shocked in part, as we all were, because the violence was gratuitous, unnecessary, not instrumentally justified, and, of course, because it was photographed. But was it really not necessary? How does sleep or sensory deprivation compare to humiliation, or to chills, or to intense fear? Which is more humane? Which more effective? Can we still distinguish the two questions?

Asymmetry—Severing the Laws of Validity and Persuasion

There is something else about this new vocabulary that is disturbing. You may remember Major General James Mattis, poised to invade Falluja, concluding his demand that the insurgents stand down with these words: “We will always be humanitarian in all our efforts. We will fight the enemy on our terms. May God help them when we’re done with them.”⁸ I know I shivered at his juxtaposition of humanitarian claims and blunt threats.

It is troubling, of course, that this so often has been a vocabulary for judgment of the center against the periphery. When the Iraqi insurgent quoted on the same page of the *New York Times* as Mattis threatened to decapitate civilian hostages if the coalition forces did not withdraw, he was also threatening innocent civilian death—less of it actually—but without the humanitarian promise. And he also made me shiver.

It is no secret that technological advances have heightened the asymmetry of warfare. In the framework of validity, it is clear that all are bound by the same rules. But as persuasion, this assumption is coming undone. When the poor deviate from the best military practices of the rich, it is tempting to treat their entire campaign as illegitimate. But before we jump to the legitimacy of their cause, how should we evaluate the strategic use of perfidy by every outgunned insurgency battling a modern occupation army? From an effects-based perspective, perfidious attacks on our military—from mosques, by insurgents dressing as civilians or using human shields—may have more humanitarian consequences than any number of alternative tactics. And they are very likely to be interpreted by many as reasonable, “fair” responses by an outgunned, but legitimate force.

There is no question that technological asymmetry erodes the persuasiveness of the “all bound by the same rules” idea. It should not be surprising that forces with vastly superior arms and intelligence capacity are held to a higher standard in the

court of world public opinion than their adversaries. As persuasion, the law in force has indeed become a sliding scale.

Persuasion and the CNN Effect

In 1996, I traveled to Senegal as a civilian instructor with the Naval Justice School from here in Newport to train members of the Senegalese military in the laws of war and human rights. At the time, the training program was operating in 53 countries, from Albania to Zimbabwe. As I recall it, our training message was clear: humanitarian law is not a way of being nice. By internalizing human rights and humanitarian law, you will make your force interoperable with international coalitions, suitable for international peacekeeping missions. To use our sophisticated weapons, your military culture must have parallel rules of operation and engagement to our own. Most importantly, we insisted, humanitarian law will make your military more effective—will make your use of force something you can sustain and proudly stand behind.

I was struck when we broke into small groups for simulated exercises, by a regional commander who kept asking the hard questions—when you capture some guerrillas, isn't it better to place a guy's head on a stake for deterrence? Well, no, we would patiently explain, this will strengthen the hostility of villagers to your troops, and imagine what would happen if CNN were nearby. They would all laugh, of course, and respond "we must be sure the press stays away."

Ah, but this is no longer possible, we said, if you want to play on the international stage, you need to be ready to have CNN constantly by your side. You must place an imaginary CNN webcam on your helmet, or, better, just over your shoulder. Not because force must be limited and not because CNN might show up, but because only force which can imagine itself being seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger, more legitimate.

Our lesson was written completely in the key of persuasion, not validity. It was a lesson apparently lost on those who considered the interrogation of "high value targets" in our own war on terror. Nevertheless, the Senegalese had learned, as Secretary Rumsfeld now seems to be learning, what was required for a culture of violence to be something one could proudly stand behind. What was required, in a word, for warfare to be civilized. The more I thought about that, however, the more it made me shiver as well.

*Comparative Law: the International Law of Armed Conflict and
Military Discipline*

I have been speaking about the law in war as if we could rather easily identify its terms. But what law governs the battlefield? If you ask an international commercial lawyer, what law governs the transaction, the answer will be anything but straightforward. Treaty law on the subject—even the World Trade Organization agreements—would only be the beginning. There would be international private law, of course. But far more importantly, national regulation with transnational effects, and the national private law built into the transaction through private ordering. Assessing the significance of these various bodies of law requires not only inquiry into their formal jurisdictional validity, but also their sociological effect. Who will want to regulate the transaction? Who will be able to do so? What rules will influence the transaction even absent enforcement?

The answer for warfare is no simpler, particularly for coalition operations, or for campaigns that stretch the “battlespace” across numerous jurisdictions. Who will try to apply what rules, who will succeed? When the Italians decide to prosecute CIA operatives for their alleged participation in a black operation of kidnapping and rendition, the law of the battlefield has shifted. The practice of military law today requires complex and shifting predictions of fact and law. Whose interpretation will prevail and before what audience?

This kind of analysis will require sophisticated comparative law, for there are more than one laws of armed conflict. The rules simply look different if you anticipate battle against a technologically superior foe, or live in a Palestinian refugee camp in Gaza. Moreover, although a national military may translate the words of the international law of armed conflict directly into its operations manual, the interpretation and intent may well be different. More often, different nations, even in the same coalition, will have implemented and interpreted the shared rules and principles quite differently. Humanitarians looking at the same rules might lean toward restrictive interpretations, adopting the perspective of the potential “victim,” while the military might lean towards greater freedom of maneuver. Although we might disagree with one another’s interpretation, we must recognize that our professional materials are elastic enough to enable quite diverse interpretations. Military law is comparative law.

As humanitarians, when we compare international rules with the military’s rules of engagement, we might well be surprised: the military rules might well be the stricter. The strength and significance of the military’s own culture of discipline can be difficult for civilians to grasp. I have tried to explain it to civilian audiences by saying it is bureaucratic necessity, central to the effectiveness of the mission and

to the safety of colleagues. But my sense is that military discipline is as much passion as reason; instrumentalism wrapped in honor and integrity in a culture set off from civilian life—a higher calling.

As a social production, military discipline is also of course, and perhaps more importantly, a work on the self. The United States Army runs recruitment commercials which implore “see your recruiter, become an Army of One.” The promise is power, to be sure. But also discipline—self-discipline. If you join, you will be transformed inside—you will become an army, coordinated, disciplined, your own commanding officer, your own platoon, embodying within yourself the force of hundreds because of the work you will do, and we will do, on you.

Of course, there is opportunity for individual judgment—and error. Soldiers who run amok. We remember the pilots who flew beneath the Italian ski lift slicing the cables. And the precision guided missile fired in Kosovo with the tail fins put on backwards, spinning ever further from its programmed target until it exploded in a crowded civilian marketplace. We remember the American pilots who bombed their Canadian allies. Or, for that matter, My Lai, the abuse of prisoners in Baghdad, and all the other tales of atrocity in war.

It can be particularly hard for civilians to grasp that when soldiers are tried for breach of military discipline, their defense is often stronger under the vague standards of international humanitarian law than under national criminal or military law. Or that international law provides the framework less for disciplining the force than for unleashing the spear at its tip.

Indeed, the international legal standards of self-defense, proportionality and necessity are so broad that they are routinely invoked to refer to the zone of discretion rather than limitation. I have spoken to numerous Navy pilots who describe briefings filled with technical rules of engagement and military law. After the military lawyer leaves, the commanding officer summarizes in the empowering language of international law—“just don’t do anything you don’t feel is necessary” and “defend yourself; don’t get killed out there.” The fighter pilot heads out on a leash of rules, assembled in a package coordinated by a complex transnational array of operating procedures. Only at the last moment, in contact with the enemy, is he released to the discretion framed by the law of armed conflict, that is, necessity, and self-defense.

What are we to make of the widespread sense that military professionals are the most disturbed by the current administration’s efforts to shrink or skirt humanitarian standards in their war on terror? Has the military gone soft? Become less willing than their civilian masters to condone harsh tactics? Or is the scandal that the JAG Corps has been more courageous in their opposition to harsh tactics than those civilian humanists who stand outside, wringing their hands, but uncertain

Distinguishing Military and Humanitarian Professions

whether they are in fact qualified to judge? Perhaps the scandal is our sense that to torture or not to torture has become a professional judgment in the first place, unavoidably linked to the question of whether harsh treatment will work. Again, how effective, in fact, is sexual humiliation, or isolation, or torture?

After the Gulf War, it was widely acknowledged that the decision to take down the electrical grid by striking the generators had left power out for far longer than necessary, contributing to unsanitary water supply and the unnecessary death of many thousands from cholera. Military planners involved have admitted this was a mistake, and they have reportedly revised their procedures accordingly. In Kosovo and Iraq, such a devastating blow to the electrical grid was not struck.

But in reviewing the Gulf War experience, they will not say that taking out the generators lacked proportionality or necessity, or that it was excessive given what they knew then and what they were trying to achieve. These legal standards remain the solid ground on which their acts, and, ultimately the deaths of many thousands, can remain legitimated

Weighing and Balancing—What Exactly?

The transformation of the law in war into a vocabulary of persuasion about legitimacy is not the end of the matter. We still need to figure out, for a given purpose, a given argument, just what is, in fact, necessary or proportional. And of course, it is in this spirit that targets in the recent Iraq conflict were pored over by lawyers. But even in the best of times, the promise of weighing and balancing is rarely met.

I have learned that if you ask a military professional precisely how many civilians can you kill to offset how much risk to one of your own men, you won't receive a straight answer. When the Senegalese asked us, we'd say "it's a judgment call." Indeed, at least so far as I have been able to ascertain, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increases, until the decision moves offstage from military professionals to politicians.

In the early days of the Iraq war, coalition forces were certainly frustrated by Iraqi soldiers who advanced in the company of civilians. A Corporal Mikael McIntosh reported that he and a colleague had declined several times to shoot soldiers in fear of harming civilians. "It's a judgment call," he said, "if the risks outweigh the losses, then you don't take the shot." He offered an example: "There was one Iraqi soldier, and 25 women and children, I didn't take the shot." His colleague, Sergeant Eric Schrumpf chipped in to describe facing one soldier among two or three civilians, opening fire, and killing civilians: "We dropped a few civilians, but what do you do. I'm sorry, but the chick was in the way."⁹

There is no avoidance of decisions of this type in warfare. The difficulty arises when humanitarian law transforms decisions about whom to kill into judgments. When it encourages us to think the chick's death resulted not from an exercise of human freedom, for which a moral being is responsible, but rather from the abstract operation of professional principles.

We know there are clear cases both ways—destroying the village to save it, or minor accidental damage en route to victory—but we also know that the principles are most significant in the great run of situations that fall in between. What does it mean to pretend these decisions are principled judgments? How should we evaluate the irreducibly imaginary quality of the promise that costs and benefits will be weighed, that warfare will be proportional, its violence necessary?

I was struck that Iraq war reporting was filled with anecdotes about soldiers overcome by remorse at having slaughtered civilians, and being counseled back to duty by their officers, their chaplains, and their mental health professionals, who explained that what they had done was necessary, proportional, and therefore just.

Of course, if you ask leading humanitarian law experts how many civilians you can kill for this or that, you will also not get an answer. Rather than saying "it's a judgment call," however, they are likely to say something like "you just can't target civilians," thereby refusing to engage in the pragmatic assessments necessary to make that rule applicable in combat; defaulting, if you will, to the external strategy of denunciation abandoned a century ago by humanitarian law.

In psychological terms, it is hard to avoid interpreting this pragmatism-promised-but-not-delivered as a form of denial; a collaborative denial—by humanitarians and military lawyers—of their participation in the machinery of war.

In the military vernacular, it might be more accurate to sense a collaborative avoidance of command responsibility and leadership; a willingness to push responsibility up to the domain of politics or down to the domain of rules. The tendency to blame the civilian leadership—or the lawyers—is well known. But we also know lawyers, whether inside or outside the military, who make that easy by pretending the law is more decisive—or more open—than it is.

The Law in War Comes Unstuck

In this audience, I do not need to emphasize the extent to which the traditional law in war is becoming unstuck; questioned from every angle.

In part this is a matter of blurring boundaries—new technologies and new modes of warfare pressing a doctrinal world imagined in the wake of wars that seemed "modern" in the 1860s. The language has proliferated—self-defense, war, hostilities, the use of force, resort to arms, police action, peace enforcement,

Distinguishing Military and Humanitarian Professions

peacemaking, peacekeeping. Who can align them confidently, like “chop,” “whip,” “blend” on the Cuisinart? They are all technical terms in military parlance and legal doctrine, but also in ethical and political discourse.

Earlier this month I participated in a lengthy discussion at the Council on Foreign Relations on “post-conflict” reconstruction. All agreed we were far from 19th-century warfare. Who was the enemy and where was the battlefield? The old days of industrial warfare are over; you’re not trying to blow stuff up on the battlefield until the political leadership surrenders. It’s asymmetric, it’s chaotic, it’s not linear. The battlespace is at once global and intensely local; there are no front lines. Here at home, we hardly seem at war—the enemy, the conflict, the political goal, all have become slippery.

For the military, everything important and difficult seems to happen in a kind of grey area between war and peace. The idea of a boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable. In the same city troops are at once engaging in conflict, stabilizing a neighborhood after conflict, and performing humanitarian, nation-building tasks.

I heard military men with experience in Bosnia, Kosovo, and Iraq all stress the continuities of the transition from war to peace; they insisted the term “post-conflict” was a misnomer. In principle, planning and training for the post-conflict phase should begin before the conflict, even if it seems hard to imagine identifying “spare” troops in the preparation phase who might be saved for later tasks. In any event, restoring water or eliminating sewage after the conflict are part of winning the war. To paraphrase Clausewitz, post-conflict action is the continuation of conflict by other means. Anyway, they wondered, when did the war start—on 9/11? In 1991? In 2003?

The boundaries are blurry. Everywhere we find public/private partnerships, outsourcing, insurgents who melt into the mosque, armed soldiers who turn out to work for private contractors. There are civilians all over the battlefield, not only insurgents dressed as refugees, but special forces operatives dressing like natives, private contractors dressing like Arnold Schwarzenegger, and all the civilians running the complex technology and logistical chains “behind” modern warfare.

The rules of engagement are no longer just those of humanitarian law or military discipline, there is also private law, contract, environmental regulation. Apparently at one point the Swiss company backing up life insurance contracts for private convoy drivers in Iraq imposed a requirement of additional armed guards if they were to pay on any claim, slowing the whole operation.

There is no question that all this generates enormously difficult doctrinal problems; we will deal with many of them over the next days. Why should weapons

permissible in domestic riot control and policing—non-penetrating bullets, certain gases—not be available on the battlefield if combat blurs easily with stabilization and law enforcement? In close quarters on board a ship interdicted during a blockade should seamen be issued weaponry appropriate for combat or law enforcement? To what extent does law shape or limit this decision?

In this new environment, we hear that humanitarian law will have to be rethought. But this is more than simply a more complex legal situation requiring more sophisticated analysis. Adjusting the law in war to post-modern warfare will require more than doctrinal ingenuity. It will require a new way of thinking about the role of law—and warfare.

Indeed, it might be more accurate to say that the fluid modern vocabulary of clear rules and sharp distinctions, broad principles and vague calculations of proportionality and necessity was designed precisely for this. It is a professional vocabulary for making distinctions and eroding them, for applying principles and simply invoking them. What will be required is a new understanding of the work of law—and of the responsibilities of command.

Sophisticated analyses of necessity and proportionality, no less than the external vocabulary of distinction and denunciation, seem ever less convincing. Each has, in its own way, become a vocabulary of warfare. More importantly, we are increasingly likely to interpret whatever military or humanitarian professionals say about the use of force in strategic terms, that is as things said for a reason, things said for tactical advantage. As professionals, civilian or military, we know how to make—and unmake—the distinctions between war and peace, between civilian and combatant.

Brigadier General Charles Dunlap gave me the arresting term “lawfare,” using law as a weapon, offensively and defensively, to legally condition the battlefield. Partly this is public relations; shaping expectations about what will happen and what will be legitimate. Getting the word out that we will—and we may—kill some civilians.

Take the difficult question, when does war end? The answer is not to be found in law or fact, but in strategy. Declaring the end of hostilities might be a matter of election theater or military assessment. Just like announcing that there remains “a long way to go,” or that the “insurgency is in its final throes.” These appear as factual or legal assessments, but we should understand them as arguments—messages but also weapons. Communicating the war is fighting the war.

The old distinctions have not disappeared. Indeed, we sometimes want to insist upon a bright line. For the military, after all, defining the battlefield defines the privilege to kill in the same way that aid agencies want the guys digging the wells to be seen as humanitarians, not post-conflict combatants. Defining the

Distinguishing Military and Humanitarian Professions

not-battlefield opens a “space” for humanitarian action. For both professions, distinguishing, like balancing, has become at once a mode of warfare and of pacifism.

Ending conflict, calling it occupation; ending occupation, calling it sovereignty; then opening hostilities, calling it a police action; suspending the judicial requirements of policing, declaring a state of emergence, a zone of insurgency. All these things are also tactics in the conflict. We are occupying, but Falluja, for a few weeks, is again a combat zone, and so on. Defining the battlefield is both a matter of deployed force and a rhetorical claim. This is a war, this is an occupation, this is a police action, this is a security zone. These are insurgents, those are criminals, these are illegal combatants, and so on. And these are all claims with audiences. The old legal issues are there—the claim must have a plausible validity; we must understand its persuasive potential.

Audience reaction matters. For detainees at Guantanamo the “war” may never end. What war, which war? The war on terror? The war on poverty? Al Qaida? In Iraq? The Taliban? Afghanistan? The war for security, for oil, for . . . ? What is, precisely, the objective that once achieved will end their war? What limits our ability to extend the war for which they are held indefinitely—doctrines of the law of armed conflict? Hardly, the CNN effect gets closer to the mark. When publics with power to impede our ability to achieve our strategic objectives find our argument that the war for those prisoners has not ended so unpersuasive that they exercise that power, we will need to change course.

We have heard that police and combat operations now go side-by-side; the zone of combat abuts, overlaps the zones of occupation and military action. Must we therefore conclude that human rights law and the law of armed conflict operate concurrently, across the battlespace? Yes and no. The assertion that human rights limits action in combat will seem persuasive to some audiences in some situations; as will the assertion that the activities are distinct, the laws separate. Lawfare—managing law and war together—requires a strategic assessment of both claims and both responses, and an active strategy by military and humanitarian actors to frame the situation in one or the other.

In these strategic assessments, the legal questions become these: who, understanding the law in what way, will be able to do what to affect our ongoing efforts? How, using what mix of behavior and assertion, can we transform the strategic situation to our advantage? This is not a question of validity, not even of persuasion. This requires a social analysis of the dynamic interaction between ideas about the law and strategic objectives.

As humanitarian and military professionals work with the law of armed conflict, they change it. Of course the law that pre-exists a conflict constrains its course—conditioning expectations, establishing habits of mind and standard procedures of

operation. Humanitarians and military professionals are used to thinking about influencing the law in peacetime through careful negotiations, through codification, through advocacy, and through assertions of right. It can be hard, in combat, to see that the law is, if anything, more open to change. When humanitarian voices seize on vivid images of civilian casualties to raise expectations about the required accuracy of military targeting, they are changing the legal fabric.

In the Kosovo campaign, news reports of collateral damage often noted that coalition pilots could have improved their technical accuracy by flying lower, although this would have exposed their planes and pilots to more risk. The law of armed conflict does not require you to fly low or take more risk to avoid collateral damage; it requires you to avoid superfluous injury and unnecessary suffering. But these news reports changed the legal context—flying high to reduce risk seemed “unfair.” Humanitarians seized the moment, developing various theories to demand “feasible compliance” that would hold the military to technically achievable levels of care. In conference after conference, negotiation after negotiation, representatives of the US military have argued that this is simply not “the law.” Perhaps not, but the effect of the legal claim is hard to deny.

Of course, the military also seeks to affect the legal context through its public affairs activity and through its action on the battlefield. Asserting a right to attack a given objective may induce defenders to tie up assets in its defense, regardless of whether you intend to attack it or not. Attacking—or not attacking—a mosque is as much a message, as a tactic on the ground.

Military action has become legal action, just as legal acts have become weapons. When the United States uses the United Nations Security Council to certify lists of terrorists to force seizure of their assets abroad, we might say that they have weaponized the law since they could, presumably, have immobilized those assets using other technologies. Similarly when they use contracts to buy up access to commercially available satellite images of the battlefield, they could presumably have denied their adversary access to those images using other weapons. The legal and military professions have indeed merged.

None of this would have surprised Clausewitz. He continued his famous paragraph on war as a continuation of policy with a striking turn to language:

[T]he chief lines on which the events of the War progress, and to which they are attached, are only the general features of policy which run all through the War until peace takes place. And how can we conceive it to be otherwise? Does the cessation of diplomatic notes stop the political relations between different Nations and Governments? Is not War merely another kind of writing and language for political thoughts? It has certainly a grammar of its own, but its logic is not peculiar to itself.¹⁰

Distinguishing Military and Humanitarian Professions

Clausewitz might well be surprised, however, by the extent to which the turn to language has revitalized the distinction between warfare and the political. In my experience, military and humanitarian professionals operating in this vocabulary share a sense that somewhere else, outside or beyond their careful calculations, somebody *else* makes decisions in a different way—exercises political judgment and discretion. This is why the absence of a clear exchange rate for civilian lives is untroubling; if the number is high enough, it will become a political decision.

The Law of War—Do Politicians Think Differently?

This takes us directly to the law of war. Normally, of course, for military professionals, the law of war is far less present. Civilian leadership means leaving questions about the legitimacy of the conflict—the decision to go to war in the first place—to a different, the political, domain.

But, as the law in war has begun to come unstuck, professionals find themselves turning increasingly to the law of war; find themselves unable to assess the legitimacy of wartime violence without assessing the legitimacy of the war itself. We might say that the law of war has become the law in war's destiny. If the use of force is to be proportional—more force for more important objectives—it seems reasonable to think there would be a sliding scale for more and less important wars. Wars for national survival, wars to stop genocide—shouldn't they legitimate more than run of the mill efforts to enforce UN resolutions?

There can be something perverse here—harsher tactics more legitimate in more “humanitarian” campaigns? But once the law of armed conflict becomes relative, a function of the conflict's legitimacy, we must ask whether the vocabulary we use to make the “political” decision to go to war differs in kind from that we use to fight—and restrain—the conflict once underway. Are “political” decisions, in fact, different from decisions of commanding officers and humanitarian advocates?

As it turns out, while the law in war has infiltrated the military profession, the law of war has been engaged in a collateral—and equally successful—campaign to infiltrate the vocabulary of politics. The law about going to war has a history quite parallel to that of humanitarian law. As a result, the distinction between professional and political judgments is far less clear than we might wish.

This story, which can be told in shorter compass, begins with a period of rather fluid justifications expressed in a mixed vocabulary of justice and sovereign right. It is not clear, that 17th-century “unjust” war ideas ever really limited the use of military force. They may well have done more to de-legitimize the enemy and justify the cause.

In any event, by the late 19th century, international law had very little to say about the decision to go to war, a silence rooted in the assumption that war was an unrestrained prerogative of sovereign power. The modern law of war is a century long pragmatic reaction against this 19th-century legal silence.

The right and capacity to make war was so central to the late 19th-century legal definition of sovereignty that even in the 1920s, we still find jurists assessing the international legal personality of the League of Nations by asking whether it has the “right” to make war. But the League’s purpose was another.

The diplomats who made the League sought to replace legal doctrines with a political institution that could sanction and deter aggression, while providing a framework for peaceful change and the peaceful settlement of “disputes.” The brave new world of institutional management was born.

After the Second World War, again in the name of pragmatism, this scheme matured into a comprehensive constitutional system. As we all know, the UN Charter aimed to establish an international monopoly of force, placing responsibility for maintaining the peace with the Security Council. War was prohibited—except as authorized by the UN Charter. Not as authorized by the United Nations, but as authorized by the Charter.

Like a constitution, the Charter was drafted in broad strokes and would need to be interpreted. Over the years, what began as an effort to monopolize force has become a constitutional regime of legitimate justifications for war.

This modern vocabulary of force has a jurisprudence—an attitude about the relationship between law and power. It is the flexible jurisprudence of principles and policies, of balancing conflicting considerations, familiar from many domestic constitutional systems.

Legal scholar Oscar Schachter gave perhaps the best description in his eulogy for Dag Hammarskjöld, who epitomized the new jurisprudential spirit:

Hammar skjöld made no sharp distinction between law and policy; in this he departed clearly from the prevailing positivist approach. He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and directions of collective action. . . . It is also of significance in evaluating Hammar skjöld’s flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of States had to be considered in a context which included the special responsibilities of the great Powers. The fact that such precepts had contradictory implications meant that they could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of

Distinguishing Military and Humanitarian Professions

the particular problem. . . . He did not, therefore, attempt to set law against power. He sought rather to find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established.¹¹

There is no doubt that this system of principles has legitimated a great deal of warfare. Indeed, it is hard to think of a use of force that could not be legitimated in these terms. It is a rare statesman who launches a war simply to be aggressive. There is almost always something else to be said—the province is actually ours; our rights have been violated; our enemy is not, in fact, a State; we were invited to help; they were about to attack us; we are promoting the purposes and principles of the United Nations. Something.

As the law in war became a matter of standards, balancing, and pragmatic calculation, the difficult, discretionary decisions were exported to the political realm. As the political vocabulary has itself become a matter of constitutional interpretation, our understanding of the political process has also been transformed.

This convergence of humanitarianism and militarism has transformed our understanding of international politics. Idealism no longer provides a standpoint external to the ebbs and flows of the policy conversation. Action legitimates norms, norms legitimate action. Humanitarians and statesmen, idealists and realists are in the same game, and are increasingly difficult to distinguish from one another.

International Politics: a Conversation about Legitimacy

In the international world, we imagine this shared vocabulary of principles and policy judgment to operate through conversation. States, private actors, NGOs, and national courts are participants in an ongoing conversation about the legitimacy of State behavior—legitimacy judged by their compatibility with UN Charter principles.

Conversing before the court of world public opinion, statesmen not only assert their prerogatives, they also test and establish those prerogatives through action. Political assertions come armed with little packets of legal legitimacy, just as legal assertions carry a small backpack of political corroboration. As lawyers must harness enforcement to their norms, States must defend their prerogatives to keep them—must back up their assertions with action to maintain their credibility. A great many military campaigns have been undertaken for just this kind of credibility—missiles become missives.

It was, after all, in this spirit that President Bush went to the United Nations to announce that he would enforce the Charter; and if he succeeded and the Iraq regime were to change and democracy and freedom released, the legitimacy deposit

in his account would be a direct transfer from the United Nations. Of course, it was a risk; but the United Nations was also daring, and risking in resisting.

When the United Nations withholds approval or refuses to participate, it may de-legitimize the military campaign. Let us suppose it does not stop it; a determined coalition pushes ahead in the name of Charter principles. In the easy cases, the campaign succeeds; the United Nations has missed out. Or the campaign fails; the United Nations is vindicated.

The difficult case is now ours. The occupation is more difficult than anticipated, the post-conflict/post-war/peace-building/nation-building phase holds hostage the ultimate success or failure of the campaign. Op-ed writers urge all parties to ignore sunk costs, to focus on the future. Surely, they argue, we all have a stake in a successful outcome, and it makes sense for the United States and the international community to cooperate.

Perhaps, but sunk costs cannot be ignored so readily. Seen dynamically, it makes sense for Bush to resist relying on the United Nations to make good his original wager as precedent for the next case; just as it makes sense for the United Nations to resist engagement. It is no accident that we sometimes feel the Europeans want the project to fail, and sometimes they do, for in this game of meaning and precedent, to ignore sunk costs and get with the program is to take a legitimacy hit.

Either way, Iraqi citizens are paying the price, not in the “great game” of 19th-century diplomacy, but in the “great conversation” of 20th-century legitimacy.

If, interpreting the law in war, humanitarians were loath to speak about the civilians who might legitimately be killed—“you just can’t target civilians”—they also resist the suggestion in the law of war that they, like military planners, decide when to draw down and when to pay into their legitimacy stockpile, and, therefore, when to accept civilian casualties as necessary for longer term objectives.

Although humanitarians talk about the long-run benefits of building up the UN system or promoting the law of force, they do not make such long-run calculations. Current costs are discounted, future benefits promised as if there were nothing to weigh against expansion of humanitarian institutions and ideas; no civilians who needed to be allowed to die for the legitimacy of the United Nations. But in this, we depart from pragmatic calculation altogether and move into the domain of absolute virtue. We are back speaking truth to power.

When I speak to civilian audiences, there is something scandalous about presenting an aircraft carrier sailing off to war as the realization of international humanitarianism. Aircraft carriers are the instruments of statesmen. Civilians prefer to think of humanitarians as gentle civilizers, lawyers whispering in the admiral’s ear, protesters marching in the streets for peace, scholars documenting the norms

Distinguishing Military and Humanitarian Professions

and standards of humanitarian law, teachers instructing soldiers in the limits to warfare. Humanitarian rulership is often rulership denied.

The transformation of the law of war into a set of constitutional standards at once defined and enforced through an ex-post assessment of legitimacy earned and spent offers an open-ended vocabulary for diplomatic and military conversation. Any and all criteria that turn out to affect the legitimacy of the action in the eyes of those with the power to affect its success will, retrospectively, turn out to have been persuasive requirements of the law of war. Like the “preferences” we think stand behind market behavior, standards of legitimacy are inevitably subjective when we look forward, objective when we look back. Professionalism has, in this sense, taken us as far as it can—fully occupying the field.

Yet this new vocabulary has its own limits, blind spots, biases. Not all voices are equally heard, not all concerns equally calculated by the group of elites we call “the international community.”

Those in the loop are likely to focus too much on the United Nations as proxy for world public opinion. Were opponents of the Iraq war serious when they claimed their objection to the war was the lack of UN approval? Would the war really have made more sense to them had France had a different government?

I worry when great debates about war and peace, staged in the vocabulary of the Charter, capture our attention. One unfortunate result: it has become routine to say that international law had little effect on the Iraq war. Arguments made by a few international lawyers that the war was illegal failed to stop the American administration and its allies, who were determined to go ahead, and who had, after all, their own international lawyers.

But this lets international law off the hook too easily. If we expand the aperture from the decision to invade, war looks ever more to be a product of law: the laws in war that legitimated targeting, the laws of war that provided the vocabulary for assessing its legitimacy, the laws of sovereignty that defined and limited Saddam’s prerogatives and have structured the occupation, not to mention commercial rules, financial rules, and private law regimes through which Iraq gamed the sanctions system and through which the coalition built its response. The UN law of force makes these background rules seem matters of fact, rather than points of choice.

The Charter scheme encourages us to think of global policy as a combination of short multilateral police actions and humanitarian assistance. It distracts our attention from the economic side of the story—and from the development policy that comes with an invasion. It shortens our sense of how long and how difficult war to build nations or change regimes is likely to be.

In the Iraq case, international law and the UN Charter focused our attention on weapons, which when not forthcoming, de-legitimated the entire enterprise.

International law urges us to respect Iraqi sovereignty, making it all too easy to think our intervention in Iraqi affairs began with the invasion and ended with the handover of the bundle of rights we have decided to call “sovereignty.”

The vocabulary of the Charter can make it more difficult to address the motives for war and devise alternative policies. Let us say the administration’s hawks were right; suppose that after 9/11 it was necessary to “change regimes” from eastern Turkey to western Pakistan. In the months before the war, the international community found it difficult to discuss regime change straightforwardly. Ideas about sovereignty, the limits of the Charter, core humanitarian commitments to the renunciation of empire; all placed regime change outside legitimate debate.

Yet supposedly sovereign regimes are already entangled with one another. They struggle every day to change one another’s regimes in all manner of legitimate ways. Why should this all become taboo when force is added to the mix, unless war is no longer, in fact, in Clausewitz’s terms, “a continuation of political intercourse, with a mixture of other means.”¹²

When it comes to force, the Charter vocabulary offered an easy and irresponsible way out. We never needed to ask how should the regimes in the Middle East—our regimes—be changed? Is Iraq the place to start? Is military intervention the way to do it? How do we compare various ways of combining military and non-military “means” to the end of regime change?

Had the Europeans not had the United Nations to shield them, not felt the geography of the European Union (EU) marked a legitimate boundary to their global responsibilities, they might well have drawn on their own experiences with “regime change” in Spain, Portugal and Greece in the ’80s, with the old East Germany in the ’90s, and now with the ten new member States in central and eastern Europe. Why not EU membership for Turkey, Morocco, Jordan, Palestine, Israel, Egypt—regime change through the promise and example of social and economic inclusion rather than military force.

Had our debates not been framed by the laws of war, we might well have found other solutions and escaped the limited choices of UN sanctions, humanitarian aid and war—in short, thought outside the box.

Decisionism: Command Responsibility, Leadership and Politics

I began this morning with a worry about the relationship between the military and humanitarian professions. Should we celebrate their merger in a new pragmatism or should we reinvigorate the pacifist impulse to stand outside and denounce?

The choice turns out to be a false one. The military and humanitarian professions have merged in a shared practice of making and unmaking the distinctions of

Distinguishing Military and Humanitarian Professions

war and peace that once marked the line between their respective domains. If ours has become a culture of violence, it is a shared culture, a product of military and humanitarian hands. If ours is history's most humane empire, that also is the collaborative achievement of humanitarian and military professionals.

The laws of force increasingly provide the vocabulary not only for restraining the violence and incidence of war, but also for waging war and deciding to go to war. We should be clear; this bold new vocabulary beats ploughshares into swords as often as the reverse. It forecloses our attention to other causes, consequences and alternatives to warfare.

The problem for humanitarians is no longer an unwillingness to be tough; humanitarians have advocated all manner of tough and forceful action in the name of humanitarian pragmatism, and their words have legitimated still more. The problem is an unwillingness to do so responsibly—facing squarely the dark sides, risks and costs of what they propose.

The problem for military professionals is no longer a lack of humanitarian commitment. The military has built humanitarianism into its professional routines. The problem is loss of the human experience of responsible freedom, of discretion to kill, and a loss of the political experience of free decision.

The worry I find most unsettling is the difficulty of locating a moment of responsible political discretion in the broader process. We are all experts, humanitarians, military professionals and statesmen, speaking a common military and humanitarian vocabulary.

The way out will not be to tinker with doctrines of the laws of force. The way forward will require a new posture and professional sensibility among those who work in this common language. When speaking to civilian audiences, I use the vocabulary of decisionism to evoke what I have in mind. Rather than fleeing from the exercise of responsible decision to the comfortable interpretive routines of their professional discourse, humanitarians should, I argue, learn to embrace the exercise of power, acknowledge their participation in governance, and cultivate the experience of professional discretion and the posture of ethically responsible personal freedom. International humanitarians, I argue, inside and outside the military, have sought power, but have not accepted responsibility. They have advocated and denounced, mobilized and killed, while remaining content that others governed and others decided.

The military vocabulary of command responsibility and leadership evokes many of the same ideas. The new law of armed conflict requires a different collaboration between the legal and military professions. The lawyer is brought along to carry the briefcase of rules and restrictions rather than as a participant in discussions of strategy for which he or she would share ethical, if not command, responsibility.

But military and humanitarian professionals alike, however close their partnership, however flexible, fluid and strategic their approach to law, yearn for an external judgment—by political leaders or others—that what they have gotten up to is, in fact, an ethically responsible national politics. In a sense, the commander who offloads responsibility for warfare to the civilian leadership is no different from the foot soldier who cites failures of leadership, or the lawyer who faults limitations in the rules.

The posture of professionalism against decision, or in contrast to responsibility, is only plausible so long as the ethicists and politicians are speaking another language. But they no longer do. Our language has become the language of politics and the language of ethics. The challenge for all of us is to recapture the freedom, and the responsibility, of discretion. Clausewitz was right; war is the continuation of political intercourse. When we make war, humanitarian and military professionals together, let us experience politics as our vocation.

Notes

1. CARL VON CLAUSEWITZ, *ON WAR* 402 (J. Graham trans., Penguin Books 1968) (1832).
2. Abraham Lincoln, Address before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), available at <http://www.presidentialrhetoric.com/historicspeeches/lincoln/lyceumaddress.html>.
3. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), available at <http://www.presidentialrhetoric.com/historicspeeches/lincoln/gettysburg.html>.
4. Paris Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S., reprinted in *THE LAWS OF ARMED CONFLICTS* 1055 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).
5. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996).
6. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863), reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 4, at 3.
7. Office of the Judge Advocate General, Canadian National Defence Joint Doctrine Manual, Law Of Armed Conflict at the Operational and Tactical Levels [B-GJ-005-104/FP-021] para. 1702, at 17-2 (Aug. 13, 2001), available at http://www.dcds.forces.ca/jointDoc/docs/LOAC_3.pdf.
8. Thom Shanker, *The Struggle For Iraq: Strategy*, NEW YORK TIMES, Apr. 11, 2004, at 1.
9. Dexter Filkins, *Either Take a Shot or Take a Chance*, NEW YORK TIMES, Mar. 29, 2003, at A1, B4.
10. CLAUSEWITZ, *supra* note 1, at 402.
11. Oscar Schachter, *Dag Hammarskjöld and the Relation of Law to Politics*, 56 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 2-7 (1962).
12. CLAUSEWITZ, *supra* note 1.